



**Conte v Mutua (Environment & Land Case 112 of 2018)
[2024] KEELC 14038 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14038 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 112 OF 2018
FM NJOROGE, J
DECEMBER 17, 2024**

BETWEEN

FELICITA CONTE PLAINTIFF

AND

ALFRED MUTUA DEFENDANT

RULING

1. The application for determination is dated 23/2/2024. It is brought by the Plaintiff under Sections 1A, 1B, 3, 3A and 38 of the Civil Procedure Act, Order 22 Rule 6 and Order 22 Rule 29 of the Civil Procedure Rules for the following orders: -
 - a. That this honourable court be pleased to issue an order for the forceful relocation and/or demolition of the Defendant's water closet on Chalet No. 14 adjacent to the Plaintiff's dining room.
 - b. That the OCS Malindi Police Station be ordered to effect and enforce these orders.
 - c. That the costs of this application be borne by the Defendant/Respondent.
2. The application is premised on the grounds on the body of the notice of motion and supported by the affidavit sworn by the Plaintiff on 23/2/2024. The gist of the application is that judgment was entered on 8/6/2023, in favour of the Plaintiff. The Court issued a declaration that the Defendant's water closet on Chalet No. 14 adjacent to the Plaintiff's dining room is a nuisance and directed the Defendant to relocate the same within 45 days. The Defendant lodged a notice of appeal and an application dated 9/8/2023 wherein he sought a stay of execution pending determination of appeal. That application was dismissed vide a ruling delivered on 25/1/2024. The Plaintiff averred that the timeline to demolish or relocate the water closet has since lapsed and the Defendant has continued to ignore all requests to adhere to the same.



3. The Defendant filed a Replying Affidavit dated 4/4/2024 opposing the application. He deposed that there is before the Court of Appeal a pending Appeal No. E025 of 2023 and an application for stay of execution of the said judgment being Civil Application No. E002 of 2024. He added that the Plaintiff and her advocates are aware of the proceedings before the Court of Appeal and granting the orders herein will render the pending appeal proceedings an academic exercise.
4. Directions on the application were given that the same be canvassed by way of written submissions. Pursuant to the directions, the Plaintiff filed written submissions dated 11/6/2024 through the firm of Khaminwa & Khaminwa Advocates and the Defendant filed his written submissions dated 18/6/2024 through the firm of B. M. Musau & Company Advocates. I have carefully considered the submissions filed.
5. The sole issue for determination is whether an order for the forceful relocation and/or demolition of the Defendant's water closet on Chalet No. 14 adjacent to the Plaintiff's dining room should be issued.

ANALYSIS

6. It is not disputed that this Court granted orders to demolish the water closet built on the Defendant's land. It is also correct that the Defendant's application for stay of execution was disallowed by this Court. The Defendant opposes the present application largely because he has a pending appeal and an application for stay of execution before the Court of Appeal. While I do not doubt that, it is also evident from the directions of that Court, annexed in the Replying Affidavit, that no interim stay of execution was granted by the Court of Appeal. This means that there is no order stopping the Plaintiff from executing the judgment in her favour. Order 42 Rule 6(1) is clear that: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

7. An application for stay of execution may be made in either this court or in the appellate court. Where an application for stay has been made in the appellate forum and execution is being sought in this court, it is only seemly for administration of justice that this court do await the outcome of that application before determining any application for execution.
8. In the given circumstances, I do not see any reason as to why any substantive ruling should be issued in respect of the substantive matters in the application dated 23/2/2024. The upshot is that the substantive ruling on the notice of motion dated 23/2/2024 in this matter is hereby deferred to await the outcome of the Court of Appeal stay application dated Civil Application No. E002 of 2024. Parties will attend a mention on 6/3/2025 before this court to report on the progress made in the appellate court application and for the taking of further directions regarding the application dated 23/2/2024 herein.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 17TH DAY OF DECEMBER 2024.

MWANGI NJOROGE



JUDGE, ELC, MALINDI

